

IN THE CIRCUIT COURT OF BOONE COUNTY
STATE OF MISSOURI

STATE OF MISSOURI,) Cause No. 11BA-CR04403
Plaintiff)
) Division No. 2
v.)
)
TABISHA FRANKLIN,)
Defendant)
)

MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT
AND PROSECUTORIAL VINDICTIVENESS,
OR IN THE ALTERNATIVE, MOTION TO APPOINT SPECIAL PROSECUTOR
AND NOTICE

COMES NOW Tabisha Franklin, by and through undersigned counsel, and for her Motion to Dismiss for Prosecutorial Misconduct and Prosecutorial Vindictiveness, or in the Alternative, Motion to Appoint Special Prosecutor, states as follows:

1. At all times relevant to this motion, Dan Knight has been the elected prosecuting attorney for Boone County. As a part of that position, he is responsible for overseeing the activities of the Boone County Prosecutor's Office and is further responsible for every prosecution and probation violation commenced by the Boone County Prosecutor's Office.

2. On or about April 28, 2009, Ms. Franklin was charged in Cause Number 09BA-CR02085 with one count of misdemeanor assault in the 3rd degree and one count of misdemeanor property damage in the 2nd degree. On January 8, 2010, Ms. Franklin plead guilty to both charges, and was sentenced to 120 days in jail on each count. The execution of the sentences was suspended, and Ms. Franklin was placed on probation.

3. On or about March 26, 2010, Ms. Franklin was charged in Cause Number 10BA-CR01268 with one count of misdemeanor assault in the 3rd degree and one count of misdemeanor property damage in the 2nd degree. On July 7, 2010, Ms. Franklin plead guilty to both charges, and was sentenced to 15 days in jail on count 1 and 90 days on count 2, to run consecutively with 09BA-CR02085. The execution was suspended, and Ms. Franklin was placed on probation. Also on July 7, 2010, Ms. Franklin admitted to violating her probation in 09BA-CR02085, and her probation was revoked and reinstated

on a new two year term of probation.

4. In October of 2010, Aaron Hobson was killed in a Breaktime parking lot in Columbia Missouri. A number of people were charged with crimes as a result of the incident. The criminal cases related to the death of Mr. Hobson have attracted a significant amount of media attention.

5. Between May 11, 2011 and May 27, 2011, the Boone County Prosecutor's Office received information suggesting that Ms. Franklin may have information relating to the Aaron Hobson homicide. Dan Knight wanted to interview Ms. Franklin and wanted her to provide information to him relating to the homicide.

6. On May 27, 2011, in 09BA-CR02085 and 10BA-CR01268, the Boone County Prosecutor's Office filed Motions to Immediately Suspend and Revoke Probation (hereinafter referred to as "Motions to Revoke"), alleging that Ms. Franklin violated her probation by failing to complete and submit proof of anger management and by possessing a firearm as alleged in Columbia Police Department report number 2010-012747.

7. Columbia Police Department report number 2010-012747 relates to the Aaron Hobson homicide. Ms. Franklin is not a suspect in the shooting of Aaron Hobson.

8. Ms. Franklin was ordered to appear in court on June 13, 2011 as a result of the State's Motion to Revoke. Ms. Franklin did appear in court on that date, and the Boone County Public Defender Office entered its appearance on behalf of Ms. Franklin.

9. After June 13, 2011, Mr. Knight's office took steps to ensure that Ms. Franklin was not represented by the Boone County Public Defender Office. These steps were taken because Mr. Knight wanted to speak with Ms. Franklin about the Aaron Hobson homicide, and one of the defendants in that homicide was being represented by the Boone County Public Defender.

10. Undersigned counsel entered his appearance for Ms. Franklin on June 30, 2011. Mr. Knight repeatedly requested that Ms. Franklin provide information and assistance relating to the Aaron Hobson homicide.

11. Ms. Franklin did not provide, and has never provided, the information or assistance sought by Mr. Knight.

12. On August 23, 2011, a Columbia Police Department officer issued citations to Ms. Franklin for driving while suspended, a child restraint violation, and failing to display lights during hours of darkness. Ms. Franklin was thereafter charged in the City

of Columbia municipal court with those offenses. Ms. Franklin did appear in municipal court on September 29, 2011, and the case was continued to October 20, 2011 for Ms. Franklin to submit proof of reinstatement of her driver's license. On October 20, 2011, Ms. Franklin appeared in municipal court, and the case was continued again for her to submit proof of reinstatement. On a date after October 20, 2011, Dan Knight's office, acting at Mr. Knight's direction, contacted the City of Columbia Prosecuting Attorney, and asked that the city prosecutor dismiss the charges and send the case to Mr. Knight's office for prosecution. On November 2, 2011, the City prosecutor did dismiss the municipal charges, and on November 3, 2011, did refer the case to Mr. Knight's office. The State filed this Indictment on November 4, 2011. The felony driving while suspended charge referenced in the Indictment in this case is premised on the same act that was the subject of the municipal prosecution.

13. It is unusual for Mr. Knight's office to contact the city prosecutor and ask that municipal driving charges be dismissed by the city prosecutor and referred to Mr. Knight's office. Driving while suspended or revoked is normally a misdemeanor offense, though it can be charged as a felony on certain grounds specified by Section 302.321 RSMo. The Boone County Prosecutor's Office does not normally prosecute others for felony driving while suspended or revoked on the grounds alleged in case number 11BA-CR04403.

14. The decisions to: (a) contact the City of Columbia municipal attorney and ask that the municipal charges be dismissed and referred to the Boone County Prosecutor's Office; (b) charge Ms. Franklin with the offense of driving while suspended; and (c) charge Ms. Franklin with a felony offense (as compared to a misdemeanor), were made for impermissible reasons - to retaliate against Ms. Franklin for refusing to provide information and assistance to the Boone County Prosecutor's Office and to law enforcement and to coerce Ms. Franklin to speak with them.

15. In November of 2011, in 09BA-CR02085 and 10BA-CR01268, the Boone County Prosecutor's Office filed a Second Motion to Immediately Suspend and Revoke Probation (hereinafter referred to as "Second Motions to Revoke"), alleging that Ms. Franklin violated her probation by possessing a firearm as alleged in Columbia Police Department report number 2010-012747 and by committing the new offense of felony driving while license suspended as alleged in Boone County case number 11BA-CR04403.

16. On November 8, 2011, Ms. Franklin appeared in court on 09BA-CR02085 and 10BA-CR01268. After receiving a new court date on the probation violation cases, Ms. Franklin was taken into custody on the warrant associated with the Indictment in this case. Normally, a person arrested at the Boone County courthouse would be taken to the Boone County Jail. Ms. Franklin was not taken directly to the Boone County Jail.

Instead, Ms. Franklin was taken to the Columbia Police Department, where she was questioned about the matter she had refused to discuss with Mr. Knight - specifically, the Aaron Hobson homicide. After Ms. Franklin was questioned, she was transported to Boone County Jail. At the time of her arrest in court, undersigned counsel was not notified that Ms. Franklin would be taken to Columbia Police Department for questioning. Ms. Franklin did not have the benefit of counsel during questioning. Arresting Ms. Franklin in court and taking her to Columbia Police Department for questioning was a blatant attempt by Mr. Knight and law enforcement to separate Ms. Franklin from counsel, deprive her of her right to counsel, and coerce her to make statements against her will.

17. As a direct result of the Boone County Prosecutor's actions in case number 11BA-CR04403, Ms. Franklin was arrested, questioned outside of the presence of counsel, has had to post bond in order to be released from jail, has been compelled to appear in court, and is facing the prospect of a possible prison sentence and felony conviction.

18. The Motions to Revoke, Second Motions to Revoke, and Indictment in this case were initiated by the Boone County Prosecutor's Office for impermissible reasons - to retaliate against Ms. Franklin for refusing to provide information and assistance to the Boone County Prosecutor's Office and to coerce her to cooperate.

19. Mr. Knight's conduct on at least one other case clearly shows an intention to retaliate against those who refuse to provide information to his office. Specifically, on October 24, 2011, in Boone County case 11BA-CR00633, Mr. Knight argued at sentencing for a thirty year sentence (to be served) because the defendant, Dmetrius Washington, had information about the Aaron Hobson homicide but refused to cooperate with Mr. Knight or provide information. Mr. Knight conceded in open court, on the record, that thirty years is more than what his office would typically recommend for Mr. Washington's crimes, but that there was an aggravating factor - that Mr. Washington failed to assist law enforcement. Mr. Knight stated, "[t]he aggravating factor that we have here is that the defendant has failed to assist law enforcement in this case. He's refusing to assist. He's refusing to testify about what he observed." Transcript of Sentencing Hearing in 11BA-CR00633 on October 24, 2011, page 8, line 25 - page 9, line 3. Mr. Knight's conduct in the Washington case shows a pattern of behavior and an intention to punish those who refuse to cooperate with him.

20. The Boone County Prosecutor's Office and Prosecuting Attorney Dan Knight have committed prosecutorial misconduct and vindictiveness in this case in that the above decisions and acts are blatant retaliation against Ms. Franklin for refusing to provide information and assistance to the State and to coerce her to speak with the State.

21. Ms. Franklin has a right to refuse to cooperate with the Boone County Prosecutor's Office and law enforcement. Ms. Franklin has no legal obligation to meet with the prosecutor or law enforcement, and she has no obligation to provide information and assistance to them. Ms. Franklin's right to refuse to cooperate is protected by the following rights: to due process; equal protection; to be free from self incrimination and to not testify against herself; to be free from compelled speech; to privacy; and to her privileges and immunities as a citizen, all as set out in the individual provisions and penumbra of provisions of the 1st, 3rd, 4th, 5th, 9th and 14th Amendments to the United States Constitution and Article I, Section 8, 10, and 19 of the Missouri Constitution, and her rights to life, liberty and the pursuit of happiness as protected by Article I, Section 2 of the Missouri Constitution.

22. There are many valid reasons why an innocent person might refuse to provide information to law enforcement. Indeed, the United States Supreme Court has recognized that the Fifth Amendment protects those who are factually innocent but otherwise might be ensnared by ambiguous circumstances, and that truthful responses of an innocent witness may provide the government with incriminating evidence from the speaker's own mouth. Ohio v. Reiner, 532 U.S. 17, 21, 121 S.Ct. 1252, 1254 (2001). Those who do provide information to law enforcement may be subjected to retaliation, threats, and great physical danger.

23. The Boone County Prosecutor's conduct complained of above has violated the following of Ms. Franklin's rights: to due process; equal protection; to be free from self incrimination and to not testify against herself; to be free from compelled speech; to be free from cruel and unusual punishment; to privacy; and to her privileges and immunities as a citizen, all as set out in the individual provisions and penumbra of provisions of the 1st, 3rd, 4th, 5th, 8th, 9th and 14th Amendments to the United States Constitution and Article I, Section 8, 10, 19, and 21 of the Missouri Constitution, and said conduct has further violated Ms. Franklin's rights to life, liberty and the pursuit of happiness as protected by Article I, Section 2 of the Missouri Constitution. Continued prosecution of this case will continue to violate Ms. Franklin's state and federal constitutional rights as more specifically set out above.

24. To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. State v. Massey, 763 S.W.2d 181, 183 (W.D. 1988), *citing* U.S. v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982). For an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 669 (1978). The State may not use coercive tactics to compel a person to waive a constitutional right or retaliate once a right is exercised. *See* State v. Quimby, 716 S.W.2d 327, 329 (W.D. 1986).

The test for prosecutorial vindictiveness is whether there is a realistic likelihood of vindictiveness in the prosecutor's augmentation of charges, given the factual situation presented. To determine this, two factors are weighed: 1) the prosecutor's stake in deterring the exercise of some right; and 2) the prosecutor's conduct. Once a realistic likelihood of vindictiveness is found, then the burden is on the prosecutor to disprove such motivation, not by subjective good faith assertions but by objective on the record explanations. Stated another way, the test becomes "whether the state had reason to bring charges other than to punish defendant for exercising his constitutional rights." State v. Massey, 763 S.W.2d 181, 183 (W.D. 1988) (Internal citations omitted).

25. If the State were permitted to punish those who exercise a right, few among us would dare to exercise that right. The fear of sanction by the State would cause a chilling effect, such that only the most brazen or foolhardy would actually do that which they are permitted to do. In substance and effect, the rights that we as citizens cherish, would be lost and would have no meaning.

26. The most appropriate remedy for the State's misconduct is to restore Ms. Franklin to the position that she would have been in, but for the misconduct and vindictiveness. The position Ms. Franklin would have been in, but for the State's misconduct, is that she be free from facing the Indictment filed in this cause. Counsel requests as relief that the Court order the Indictment dismissed with prejudice.

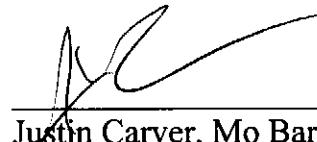
27. In support of his alternative request for relief, counsel alleges that Prosecuting Attorney Dan Knight has an interest in this case in that he has committed prosecutorial misconduct and vindictiveness and is now a witness in relation to this Motion. Pursuant to Section 56.110 RSMo, the Court has the power to order that a special prosecutor be appointed. Counsel asks, in the alternative to a dismissal, that the Court exercise its power to appoint a special prosecutor and to remove Dan Knight and the Boone County Prosecutor's Office from the prosecution of this cause.

WHEREFORE Ms. Franklin, through counsel, requests that this Court: (i) hold an evidentiary hearing on this Motion; (ii) enter an Order dismissing the Indictment with prejudice; and (iii) grant such further relief as the Court deems proper and just. As to his alternative request for relief and should the court not dismiss the Indictment, counsel requests in the alternative that the Court: (i) hold an evidentiary hearing; (ii) enter an Order removing Dan Knight and the Boone County Prosecutor's Office from the prosecution of this cause; (iii) appoint a special prosecutor; and (iv) grant such further relief as the Court deems proper and just.

NOTICE

COMES NOW defendant by his attorney Justin Carver, District Public Defender, and hereby gives notice to the Court and to counsel for the State that on the 21st day of February, 2012, at 1:30 p.m. counsel will ask that the Court set this Motion for an evidentiary hearing on a future date.

Respectfully submitted,



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Certificate of Service

I certify that a true copy of the above and foregoing was personally served on all parties this 14th day of February, 2012.



Justin Carver